IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6827 of 2003

HONOURABLE MR.JUSTICE KS JHAVERI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE OF GUJARAT - Petitioner(s)

Versus

APPELLATE AUTHORITY FOR INDUSTRIAL AND FINANCIAL RECONST. & 13 - Respondent(s)

==========

Appearance :

Mr. S.N. SHELAT, Advocate General with MRS MANISHA LAVKUMAR SHAH, AGP for Petitioner

SERVED BY RPAD - (N) for Respondent(s) :3,6 - 8, 12, 14,

Mr. L. NAGESHWARA RAO & Mr. N.D. NANAVATI, Senior Counsel with MR GL RAVAL & MRS KALPANA K RAVAL for Respondent No.2

NOTICE SERVED for Respondent(s) : 4 - 5.

MR PV NANAVATI for Respondent(s) : 6,

MR PRANAV G DESAI for Respondent(s) : 9, 13,

MR BHARAT JANI for Respondent(s) : 10,

NOTICE UNSERVED for Respondent(s) : 11,

==========

CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 01/12/2005

CAV JUDGMENT

1.0 By way of this petition, the petitioner-State of Gujarat, has challenged the order dated 21st November 2002 passed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) in Appeal No.367 of 2001 presented by Gujarat Sidhee Cement Limited (hereinafter referred to as GSCL), the respondent no.2 herein whereby the AAIFR allowed the said appeal, quashed and set aside the order dated 29th November 2001 passed by the Board for Industrial and Financial Reconstruction (BIFR), and directed the State Bank of India (SBI) to continue as Monitoring Agency (Operating Agency) and to submit half-yearly progress reports to the BIFR.

2.0 The short facts as they emerge from the record can be summarized as under:

2.1 The GSCL was established and registered under the provisions of the Indian Companies Act, 1956. GSCL has its registered office at Sidheegram, Junagadh District of Gujarat. Due to market recession GSCL suffered losses and ultimately registered with BIFR under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as SICA) in July 1990. A rehabilitation scheme was presented in the year 1990 and the GSCL was registered under section 3(1)(o) of SICA. Initially the scheme was

sanctioned on 26th October 1993 and State Bank of India was appointed as the Operating (Monitoring) Agency. On 30th May 2001 BIFR granted last extension for submitting modified scheme, but the same could not be presented, as a result of which the BIFR passed an order on 29th November 2001 for winding up of GSCL.

2.2 Feeling aggrieved by the order passed by BIFR, GSCL preferred Appeal No.367 of 2001 before AAIFR. The Company submitted their scheme on 12.2.2002.

2.3 By their letter dated 15th February 2002 the State Government informed AAIFR that rehabilitation plan of the company depends critically on reliefs and concessions envisaged from the State Government, and as reliefs and concessions are not within the policy guidelines of the Government, the matter is required to be considered at higher level of the Government. It was further stated that due to the unavoidable situation and the by-election in the State the proposal of the Company could not be considered.

2.4 On 19th February 2002 AAIFR issued notice under section 19(2) of the Act inviting objections from all the parties pursuant to the presentation of the revival scheme of GSCL.

2.5 The State Government-present petitioner sent their suggestions on 29th April 2002 wherein they had suggested that there should be parity of sacrifice between Financial Institutions/ Banks/Promoters and State Government and therefore the Draft Rehabilitation Scheme should be re-worked with higher contribution from promoters. The petitioner reiterated their stand before AAIFR which was taken by them in their letter dated 29th April 2002.

2.6 On behalf of GSCL it was pointed out that the sacrifice of FIs/Banks is over 65% of their total outstanding dues of about 66.35 crores, which is above the sacrifice by the Government of Gujarat at about 55% of its total outstanding dues of Rs.218.82 crores. According to GSCL, the promoters of GSCL had met the Government of Gujarat at high level and pursuant to those discussions, the promoters have agreed to mobilize and bring in additional contribution of Rs.13.24 crores.

2.7 When the matter came up for hearing on 27th May 2002, AAIFR found that the Government of Gujarat has neither withheld nor given its consent but has only urged that there should be parity in the sacrifices by FIs/Banks on one hand and the Government of Gujarat on the other, and that the promoters should bring in higher contribution. AAIFR was of the opinion that as the outstanding dues of FIs/Banks and the Government of Gujarat are different, the principle of parity can be observed in terms of percentage and

not in terms of absolute amounts, and as the promoters have already agreed to mobilize and induct funds of Rs.13.24 crores in addition to Rs.15 crores envisaged in the Scheme, the points raised by the Government of Gujarat have been substantially met. In the order dated 27th May 2002 the AAIFR directed as under:

> "21. IDBI shall communicate the result of their meeting regarding FIs participation in term loan to GSCL and SBI within a week. GSCL shall supply all the required information for preparation of revised projections by SBI. SBI shall prepare the revised version of DRS after incorporating the modifications pursuant to the decisions recorded above and the information to be received from IDBI about participating FIs in term loan, along with revised statements of projections and submit copies thereof at least five days before the next date of hearing with copies to all concerned."

2.8 The matter was thereafter adjourned to 4th July 2002 for further orders. In the meantime the petitioner addressed a communication dated 25th June 2002 pointing out that the State Government is not in a position to accept the concessions envisaged from the Government of Gujarat, as the equitable and matching principle is not satisfied. It was further stated that it has been the policy of the State Government since last 11 years that unless equitable and matching principle is satisfied there is no question of the Government of Gujarat participating in any such rehabilitation scheme. Again vide communication dated 16th August .2002 the petitioner informed AAIFR the details of the sacrifices required to be made by the State Government as

against those of Banks/FIs. It was pointed out that vide order dated 27.5.2002, the AAIFR had made a mistake in recording that the principle of parity was maintained in terms of percentage though not on quantum basis in terms of absolute amounts.

2.9 After considering the facts and circumstances of the case, AAIFR passed order on 21st November 2002 sanctioning the Draft Rehabilitation Scheme and rejecting the request of the petitioner regarding issuing clarification of order dated 27th May 2002 on the ground that the authority cannot review its own order. It is the aforesaid order dated 21st November 2002, which is under challenge in this petition.

3.0 Mr. S.N. Shelat, learned Advocate General appearing for the petitioner-State Government submitted that AAIFR has committed an error in sanctioning the scheme. According to him, the State Government has not given consent, AAIFR erroneously sanctioned the scheme on the basis that the State Government has given their consent. He submitted that consent of the State Government is a pre-condition under sub-section (2) of section 19. The said subsection (2) of section 19 reads as under:

> "19(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period,

> not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given."

3.1 Mr. Shelat has also relied upon sub-section (4) of section 19 which reads as under:

> "(4) where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit."

3.2 Mr. Shelat therefore submitted that AAIFR could not have sanctioned the scheme in question.

3.3 Mr. Shelat submitted that AAIFR has not considered the previous sacrifice on the part of the petitioner and has adopted a different criterion for financial institutions of the State Government. According to him, if the entire sacrifice right from 1990 is taken into consideration, then the sacrifice of the State Government is on higher side. According to him the letter dated 29th April 2002 was very clear that the proposed scheme on which the objections were invited, was objected by the petitioner and it has not given consent for implementation of the scheme.

3.4 According to Mr. Shelat, AAIFR has committed an error in holding that the equitable and matching principle is required to be satisfied in terms of percentage and not in terms of absolute amounts and thus by way of an interim order, during the course of hearing on 27th May 2002 observed that the principle stands satisfied.

3.5 Mr. Shelat submitted that GSCL has paid Rs.318 crores to Banks and Financial Institutions at the cost of Government of Gujarat by way of relief of deferment of Government taxes and therefore GSCL is trying to escape from tax liability by seeking benefit under one scheme or the other Government Resolution while continuing to make payment to banks and financial institutions.

3.6 According to Mr. Shelat, the finding of AAIFR with regard to deemed consent is not tenable inasmuch as the order dated 27th May 2002 was not a final order sanctioning the scheme. He pointed out that the matter was adjourned to 24th October 2002 and thereafter till it was finally decided on 21st November 2002. He submitted that the government sacrifices are given from the public fund and cannot be used arbitrarily.

3.7 Mr. Shelat further contended that AAIFR has erroneously extended the moratorium period upto 31st March 2004 without giving any opportunity to the

petitioner to meet with the suggestions made by AAIFR.

3.8 Mr. Shelat also contended that the reliefs sought for by GSCL far exceeds and are beyond the guidelines adopted by Government of Gujarat and as such are against the provisions of Tax Laws of the State. According to him as per the State guidelines only five years deferment can be granted, which the Company has already availed of.

3.9 Mr. Shelat has also pointed out the meaning of “Consent” as contained in P. Ramanatha Aiyar's Advanced Law Lexicon, Volume 1, A-C, 2005, which reads as under:

> ““CONSENT” is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side” (Story, S.222). “Where a consent is given substantially, the Court does not look very minutely into the form in which it is given” (per STIRLING, J. Re Smith, 59 LJ Ch 284).”

3.10 In support of his submissions Mr. Shelat has relied upon decision of the Apex Court in the case of P. John Chandy and Company (P) Ltd. Vs. John P. Thomas, reported in AIR 2002 SC 2057 (=2002(5) SCC 90 = JT 2002(4) SC 444). Paragraphs 10 and 11 of the said decision read as under:

> “10. We may now turn to the question of implied consent in the background of the relevant provision.
>
> Section 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act,

1965 reads as under:

11(4)(i). A landlord may apply to the rent control court for an order directing the tenant to put the landlord in possession of the building,

(i) if the tenant after the commencement of this Act, without the consent of the landlord, transfers his right under the lease or sub-lets the entire building or any portion thereof if the lease does not confer on him any right to do so;

Provided ....”

A perusal of the relevant provision as quoted above clearly indicates that the landlord can claim possession of the building from the tenant in case of sub-letting by the tenant without the consent of the landlord, in case the lease does not confer on the tenant a right to sub-let. The provision provides for “conferment” of right on the tenant to sub-let the accommodation. That is to say so as to be entitled to sub-let, the tenant must be granted that right to do so, by the landlord. The expression “confer” is pointer to something done overtly and explicitly. The meaning of the word “confer” as indicated in the Law Lexicon by P. Ramanatha Aiyar 2nd Ed. Reprint 2000 at page 381 means “go give”. “Conferring is an act of authority – men in power confer”. It is therefore clear that the conferring indicates some positive action in giving something, may be some right or privilege to another person. It is in this background that the word “consent” as occurring in clause (1) of sub-section (4) of section 11 of the Kerala Buildings (Lease and Rent Control) Act, 1965 is to be seen. According to the said provision if the lease does not “confer” a right on the tenant to sub-let, he cannot do so without the consent of the landlord. If he does so after coming into force of the Act, he would be liable to be evicted and the possession be given to the landlord. On reading of the whole provision proposition of implied consent, in such cases, would not be readily acceptable. The consent of the landlord should be in a positive way, clear cut and without ambiguity since otherwise right to sub-let is only to be conferred on the tenant by the landlord in the lease itself. It can reasonably be expected that a right which is otherwise to be conferred by having such a condition in the lease itself, consent, in absence thereof, preferably be in writing and in case it is not so, it is to be clear cut without any ambiguity or shadow of doubt. The conduct of the landlord which has been mainly taken into account on the point of implied consent, is his inaction for a long time despite the knowledge of the fact of sub-letting by the tenant to other persons. The period of 32

years as indicated by the appellate authority is incorrect as discussed earlier. Nonetheless it can be said that there has been inaction on the part of the landlord for some years if not 32 years. But inaction in every case does not necessarily lead to an inference of implied consent or acquiescence. In this connection we may refer to Words and Phrases Legally Defined Vol. 1 Third Ed. Page 27 where we may first see what has been said about acquiescence. It is as follows:

> "Mere inactivity on the part of a defendant is not to be construed as acquiescence in delay by the plaintiff. "sleeping dogs, in the form of sleeping plaintiffs, need not be aroused by defendants from their slumbers" (per Roskill LJ in Compagnie Francaise de Television V. Thorn Consumer Electronics Ltd. [[1978] RCP 735 at 739]]; Bremer Vulkan Schiffbau and Maschinenfabrik V. South India Shipping Corporation [1979] 3All ER 194 at 198, per Donaldson, J.".

It may also answer the observation of the appellate court that the landlord by inaction is to be taken to have waived his right to take any action against the tenant.

11. A distinction has also been drawn between `acquiesence' and `consent'. It is in relation to a dispute between a landlord and a tenant and we again refer to Words and Phrases Legally Defined Vol. 1 Third Ed. Page 314.

> "[The Landlord and Tenant Act, 1954, section 23(4) is concerned with a situation where an immediate landlord or his predecessor in title has `consented' to a breach of covenant, or the immediate landlord has acquiesced in it'. "I agree ..... that in the context of section 3(4) of the Act, whatever consent or acquiescence may mean in different contexts, in that context `consent' is put in plain antithesis to `acquiescence', and that, therefore, if something falls within the description of `acquiescence', it is not consent. The difference which is pointed out between the two in this context is that `consent' involves some affirmative acceptance, not merely a standing by and absence of objection. The affirmative acceptance may be in writing, which is the clearest obviously; it may be oral; it may conceivably even be by conduct, such as nodding the head in a specific way in response to an express request for consent. But it must be something more than merely standing by and not objecting. `Bell V Alfred Franks & Bartlett Co. Ltd. [1980] 1 All ER 356 at 362. C.A.per Megaw LJ."

> The above observations though no doubt made in reference to particular provision, yet they throw some light on the question of implied consent that there has to be something more than mere inaction or lack of initiative on the part of the landlord. In context with the above, we find our view reinforced on the meaning and import of the word `consent' as used in clause (i), subsection (4) of section 11 of the Act when read in the background of the word `confer' in the latter part it will only mean that consent has to be with some positive action on the part of the landlord so that the tenant can be said to have had the authority to sub-lease his lease rights. Mere silence may not be enough."

3.11 Mr. Shelat has next relied upon a decision in the case of Sukhrani V. Hari Shanker, reported in AIR 1979 SC 1436 (= 1979(3)SCR 671 = 1979(2) SCC 463). Para 5 of the said decision reads as under:

> "5. It is true that at an earlier stage of the suit, in the proceeding to set aside the award, the High Court recorded a finding that the plaintiff was not entitled to seek reopening of the partition on the ground of unfairness when there was neither fraud nor misrepresentation. It is true that the plaintiff did not further pursue the matter at that stage by taking it in appeal to the Supreme Court but preferred to proceed to the trial of his suit. It is also true that a decision given at an earlier stage of a suit will bind the parties at later stages of the same suit. But it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher Court is not precluded from considering the matter again at a later stage of the same litigation (Vide Satyadhan Ghosal V. Smt. Deorajin Debi (1960) 3 SCR 590: (AIR 1960 SC 941). So, it has been held that the correctness of an order of remand passed by the high Court which was not questioned at that time by filing an appeal in the Supreme Court could nevertheless be challenged later in the supreme Court in the appeal arising out of the final judgement pronounced in the action (vide Jasraj Indu Singh V. Hem Raj Multan Chand (AIR 1977 SC 1011) and Margaret Lalita Samuel V. Indo Commercial Bank Ltd., AIR 1979 SC 102). In

> Arjun Singh V. Mohindra Kumar (1964) 5 SCR 946 at p.960: (AIR 1964 SC 993 at p. 1000) it was held that where an application under Order IX, Rule 7 was dismissed and an appeal was filed against the decree in the suit in which the application was made, the propriety of the order rejecting the reopening of the proceeding might without doubt, be canvassed in the appeal and dealt with by the appellate Court. In our view the same principle applies in the present case and the parties can challenge in this Court in the appeal against the final judgement in the suit any finding given by the High Court at the earlier stage in the suit when the award made by the arbitrators was set aside and the suit thrown open for trial."

3.12 Mr. Shelat has also relied upon a decision in the case of Amar Chand Butail Vs. Union of India, reported in AIR 1964 SC 1658. Paragraph 9 of the said decision reads as under:

> "(9) It appears that at the stage of trial, a document purporting to be an affidavit was filed making a claim for privilege on behalf of respondent no.2. This document was signed by Padam Dev who was the Home Minister in Himachal Pradesh. It is clear that on the point of the privilege the appellant cannot be met by the plea of res judicata in this court, because whatever may have been the position in regard to the effect of the interlocutory orders passed by the Judicial Commissioner on this point. Now that the matter has come to this court in the form of an appeal by the appellant against the final decree passed in the suit, it is perfectly open to him to contend that the courts below were in error in upholding the plea of privilege. This position is not and cannot be disputed. Therefore, the question which arises for our decision is whether the claim for privilege was justified."

4.0 Mr. Nageshwara Rao, learned senior counsel appearing for GSCL, the respondent no.2 herein, has supported the order passed by the AAIFR. At first he submitted that when all the financial institutions have accepted the scheme, it will not be appropriate to disturb the same, which has already been

implemented for three years.

4.1 Referring to the communication dated 29th April 2002, Mr. Rao submitted that it clearly indicates consent if sacrifices is equal and/or the promoters increase their contribution. According to him, that was the only stipulation which the promoters have accepted and implemented. He, therefore, submitted that there was conditional consent by the petitioner which has been accepted by the GSCL, it was not open for the petitioner to change those conditions after statutory period is over.

4.2 Mr. Rao submitted that the petitioner has challenged only the order dated 21st November 2002, which according to AAIFR, is an order seeking review and according to the petitioner an order of modification/clarification of the earlier order dated 27th May 2002. The final order dated 27th May 2002 has not been challenged by the petitioner and therefore the present petition is not maintainable. In this connection Mr. Rao has relied upon a decision in the case of S.K.Saldi Vs. U.P. State Sugar Corporation Ltd., reported in 1997 (9) SCC page 661 (1997(2) JT 567 = 1997(2) Scale 188). Para 3 of the said decision reads as under:

> "3. Shri Pramod Swarup, learned counsel for the appellant, contends that when the appellant was initially appointed in the Meerut Sraw Board Mills and was transferred to the Mill on deputation, he was entitled to be repatriated when the Mill was

> not inclined to retain his services and, therefore, the direction issued by the Civil Court is valid in law and the High Court was not justified in reversing that order. As stated earlier, the appellant had to cross several insurmountable hurdles, namely, in the suit the appellant had not impleaded his employer M/s Jaswant Sugar Mills with whom he claimed to have been appointed. He suo motu impleaded the sugar mill in the SLP filed in this Court and subsequently, it was deleted. Under these circumstances, the sugar mill against whom the relief was sought was not a party to the suit. Therefore, the suit was liable to be dismissed for non-joinder of necessary and proper party. The second difficulty in the way of the appellant was that the main order was allowed to become final and he did not challenge the same. Under these circumstances, the review order could not have more force than the original order. Therefore, we do not find any manifest error of law warranting interference." (Emphasis supplied)

4.3 Mr. Rao submitted that the High Court will issue a writ of a certiorari only when there is an error apparent on record or when the order impugned suffers from jurisdictional errors. He submitted that normally the High Court will not exercise its discretion unless the impugned order is a perverse order. He further submitted that the Appellate Authority has considered the interest of all concerned and formed an opinion in favour of revival of the company. Therefore, even if a second view is possible, it is not desirable to change the same after the scheme was implemented and in operation and when the parties have altered their position.

4.4 In support of this contention he has relied upon the decisions reported in the cases of State of UP Vs. Johrimal - AIR 2004 SC 3800, Ranjit Singh

Vs. Raviprakash - AIR 2004 SC 3892, Ranjeet Singh Vs. Ravi Prakash - 2004 SCW 4221, Suryadev Rai Vs. Ramchander Rai - 2003(6) SCC 675 and Vinedale Distilleries Ltd. Vs. Appellate Authority for Industrial and Financial Reconstruction and others - 2002(108) Company Cases 166 (AA).

4.5 Mr. Rao submitted that the letters dated 29th April 2002 and 4th May 2002 received by AAIFR were beyond the prescribed period of 60 days as mentioned in section 19 of the Act. He submitted that now it is not open for the State Government to raise contention with regard to the provisions of section 19(2) and 19(4) of the Act in view of the fact that they have not objected within sixty days. Therefore it can be said that there is deemed consent under the Statute.

4.6 Mr. Rao also submitted that after the order dated 27th May 2002 of AAIFR, only reworking of the scheme by making changes in the period of moratorium was to be done. There was no objection raised by anybody including Government of Gujarat. Apart from that the AAIFR was also awaiting confirmation of consent from IDBI. He, therefore, submitted that no case is made out for causing interference in the present petition.

4.7 In view of the aforesaid submissions Mr. Rao submitted that the petition deserves to be rejected.

5.0 Mr. Pranav Desai appearing for the State Bank of India submitted that the order passed by AAIFR is within its jurisdiction and does not suffer from any error of law or infirmity or jurisdiction. He submitted that the present petition is barred by delay, latches and acquiescence and therefore not maintainable in law. He submitted that the outstanding dues of the financial institutions and banks were different and therefore the principle of parity could be observed in terms of percentage and not in terms of absolute amount.

5.1 Mr. Desai submitted that financial institutions and banks have extended fresh assistance in addition to the reliefs and concessions to rehabilitate the company. He submitted that it is only after considering objections/suggestions received from the parties the Draft Rehabilitation Scheme was sanctioned. He further submitted that the sanction of the scheme was only after following proper procedure, carrying out due diligence for restoring the net worth of the company and for repaying the long term liabilities of the company. He therefore submitted that it cannot be said that deferment of taxes is unjust enrichment for the company.

5.2 Mr. Desai submitted that the State Government policy with regard to reliefs/concessions to be granted to BIFR companies, as spelt out in Government of Gujarat Industries & Mines Dept. GR No.LML-

1090/116/B/273-P dated 26th June 1991, which was in force at the material time, does permit relaxations beyond guidelines in individual cases. The relevant provision in the GR itself states that “where relaxation is required in individual cases, Government orders will be obtained”. He therefore submitted that the Operating Agency has not committed any error in including reliefs and concessions beyond the scope of the policy of the Government of Gujarat.

5.3 Mr. Desai submitted that since the scheme has worked for almost three years at this stage the petition deserves to be dismissed. He further submitted that he is also adopting the arguments advanced on behalf of the GSCL and submit that the petition may be dismissed.

6.0 Mr. Bharat Jani for IDBI has supported the contentions raised on behalf of GSCL and the Operating Agency and submitted that the petition deserves to be dismissed.

7.0 The other respondents have not supported the case of the petitioner and have accepted the order of AAIFR.

8.0 At the outset it is required to be noted that the present petition is against the order of the Appellate Authority dated 27th November 2002

whereby the Appellate Authority has refused to review the order dated 27th May 2002. Therefore, the question to be decided by this Court is whether the order passed by the AAIFR is a perverse order and whether AAIFR has committed any jurisdictional error in passing the order in question. It is also required to be noted that while admitting this petition, this Court has not stayed the order of AAIFR and allowed the Operating Agency to proceed with the scheme. Therefore, at this stage this Court has, under Article 227 of the Constitution of India, very limited jurisdiction. Before proceeding further few decisions may be noted in this regard.

8.1 In the case of State of U.P. V. Johri Mal, reported in AIR 2004 SC 3800 (=2004(4) SCC 714 = 2004 (Supp-I) JT 443 = 2004(5) Scale 1), in paragraph 28 it is held as under:

> "The limited scope of judicial review succinctly put are: (i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies; (ii) A petition for a judicial review would lie only on certain well defined grounds; (iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal; (iv) A mere wrong decision without anything more is not enough to attract the power of judicial review, the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice; (v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgement of the

legislative bodies.” (emphasis supplied)

8.2 In the case of Ranjeet Singh V. Ravi Prakash, reported in 2004 AIR SCW 4221 (2004(3) SCC 682 = 2004(4) JT 127 = 2004(3) Scale 481) it is held that the High Court cannot act as an appellate Court and reappreciate the evidence and setting aside the judgement of the lower appellate court.

8.3 In the case of Surya Dev Rai Vs. Ram Chander Rai, reported in AIR 2003 SC 3044 (= 2003(6) JT 465 = 2003(6) scale 133) = (2003)6 SCC 675, it is held that writ of certiorari is issued for correcting gross errors of jurisdiction while supervisory jurisdiction under Article 227 is exercised for keeping subordinate courts within bounds of their jurisdiction. It is further held that such jurisdiction is available only when (i) the error is manifest and apparent on face of record and (ii) grave injustice or gross failure of justice has been occasioned thereby.

8.4 In the case of Vinedale Distilleries Limited and Another Vs. Appellate Authority for Industrial and Financial Reconstruction and others, reported in 2002(108) Company Cases 166 (A.P) it is held as under:

> “In exercise of its jurisdiction under Article 226 of the Constitution in the matter of reviewing orders of the Board for Industrial and Financial Reconstruction, reappreciation of evidence by the court is totally impermissible. The Court may have to judicially review the decision or the order, but the court

> would interfere only if it finds that the decision-making process is vitiated by an error apparent on the face of the record. The court would interfere with findings and conclusions of the Board for Industrial and Financial Reconstruction if they are perverse. Non-consideration of material evidence may vitiate the findings. The court may in a given case direct the Appellate Authority or the Board for Industrial and Financial Reconstruction to reconsider the matter in accordance with law. But the court in exercise of its judicial review jurisdiction would not substitute the findings for that matter of the quasi-judicial bodies who are entrusted with the duty to decide the matter under the Sick Industrial Companies (Special Provisions) Act, 1985."

9.0 It is an admitted fact that the petitioner-State Government has not invested any amount in GSCL. The amounts which are outstanding are dues in respect of taxes and other benefits which were extended for establishing the company. It is the policy of the State to offer subsidy and deferment of tax to a company which desires to set up a company in a backward area within the State of Gujarat. Therefore, the capital invested by secured creditors and the dues of tax, etc. will have different considerations while considering the scheme of rehabilitation under SICA.

9.1 There is no dispute that AAIFR passed an order on 19th February 2002 directing the concerned parties to give their objections within 60 days to the scheme prepared by SBI, which is the Monitoring Agency. In the order itself, it is stated that no extension of time beyond sixty days shall be granted and that non-receipt of any response within the prescribed period of sixty days shall be treated as deemed consent. In response to this the petitioner through

Industries and Mines Department addressed a letter on 29th April 2002 to AAIFR. This communication is admittedly after a period of 60 days of the order of AAIFR. In this communication the only grievance voiced on behalf of the petitioner is as under:

> "The basic principle of Government of Gujarat policy for the rehabilitation of sick unit is that there should be parity of sacrifice by FIs/Bans, promoters and that of State Government. In this case, as brought out above, the sacrifice expected from the Government is way above the sacrifice of either the FIs/Banks or the promoters. In view of this, it is the considered view of the Government of Gujarat that the Draft Rehabilitation Scheme should be reworked with higher contribution from promoters to bring about the better balance with what is the sacrifice expected from the State Government."

9.2 It may be noted that though the communications dated 15.2.2002 and 19.2.2002 are on record, the authority has not extended the period of 60 days, and the request of the petitioner was also not accepted by the authority. The letter dated 29.4.2002 was considered by the authority only with a view to avoid any complication, otherwise the last date was 21.4.2002 and therefore, it should be considered as deemed consent.

9.3 Thus, the suggestion was that there should be higher contribution from promoters or for reworking of the scheme. The aforesaid communication was noted in paragraph 14 of the order dated 27th May 2002 and the same was dealt with in paragraph 16 of the said order. Paragraph 16 of the said order

reads as under:

> "16. The Government of Gujarat has neither withheld nor given its consent but has urged that there should be parity in the sacrifices by FIs/Banks on the one hand and the Government of Gujarat on the other hand and that the promoters should bring in higher contribution. As the outstanding dues of FIs/Banks and the Government of Gujarat are different, the principle of parity can be observed in terms of percentage and not in terms of absolute amounts. The promoters have already agreed to mobilize and induct funds of Rs.13.224 cr. In addition to Rs.15 cr envisaged by the DRS. Therefore the points raised by the Government of Gujarat have been substantially met."

9.4 It is evident from the above paragraph that in pursuance of the suggestion by the petitioner by their communication dated 29th April 2002, the promoters have agreed to mobilize and induct funds of Rs.13.24 crores in addition to Rs.15 crores. Therefore, the suggestion of the petitioner has been considered and positively acted upon by the promoters. AAIFR therefore concluded that the points raised by the petitioner have been substantially met. There was no other suggestion and/or objection on behalf of the petitioner. In fact there was conditional consent and both the conditions were fulfilled. I am of the view that the opinion for parity in terms of absolute amounts was rightly not accepted by AAIFR. Further the order in question has achieved finality or else the State Government ought to have challenged the said order.

9.5 In this connection it is required to be noted that in the case of S.K.

Saldi Vs. General Manager, U.P. State Sugar Corporation Ltd., reported in (1997)9 SCC 661 the Supreme Court held that when the main order is allowed to become final, in absence of challenge against the same, review order cannot have more force than the original order. The aforesaid order was passed after hearing the parties. Therefore I do not find any merits in the contention that there was no consent on the part of the petitioner.

9.6 However, again on 25th June 2002 the petitioner reiterated their stand and stated that equitable and matching principle is not satisfied in the present case. Again petitioner has written letter dated 16th August 2002 stating that the petitioner is not in a position to agree with any of the reliefs/concessions sought in the modified DRS. In view of these letters, at the time of hearing of the appeal, on behalf of the petitioner it was submitted that the petitioner was not seeking review of the earlier order, but only a clarification and modification in view of the Government of Gujarat Resolution dated 28th June 1991. The AAIFR has considered this question and found that the petitioner is seeking review of the earlier order and not a clarification. Therefore, the applications were rejected. Apart from that the contention raised in subsequent letters dated 25.6.2002 and 16.8.2002 cannot be considered in view of the statutory restriction and also the order dated 27.5.2002.

9.7 As stated hereinabove, by letter dated 29th April 2002, the petitioner

has only made suggestion that the Draft Rehabilitation Scheme should be reworked with higher contribution from promoters to bring about better balance with what is the sacrifice expected from the State Government. This was considered by AAIFR and in view of the fact that the promoters have agreed to increase their contribution, AAIFR came to the conclusion that the points raised by the petitioner have been substantially met. The petitioner has not challenged the order dated 27th May 2002. They only sought clarification of the said order. The AAIFR, after hearing the counsel for the petitioner and after considering the aforesaid aspect, came to the conclusion as under:

> "8. We have considered these contentions. As also admitted by the learned counsel for the GOG this Authority has no power to review its own order being a Tribunal of limited jurisdiction. We have gone through the submissions made in letters dated 25.6.2002 and 16.8.2002. What these letters show is that the State Government is aggrieved and is not satisfied with the decision of this Authority contained in para 16 of order dated 27.5.2002. This is nothing but seeking review of our order and not clarification. The order is clear and explicit. These applications are dismissed."

9.8 It is well settled that AAIFR has no power to review its own order. Even though the petitioner termed the applications for clarification, a perusal of the request would show that it is in the nature of a request for review and modification of the order inasmuch as in the communication dated 16th August 2002 the petitioner has clearly stated that the petitioner is not in a position to

agree with any of the reliefs/concessions sought in the modified DRS. AAIFR has dealt with this aspect in detail in the impugned order and did not accept the request of the petitioner. On the facts of the case I am of the view that the petitioner has failed to point out that the order in question is a perverse order. I also find that there is no error apparent on the face of the record so as to warrant interference by this Court with the impugned order.

10.0 A bare perusal of the contentions raised on behalf of the petitioner would show that all those contentions are raised for the first time in this petition. Those contentions could have been raised before the AAIFR while the matter was last heard on 21st November 2002. In fact at the time of hearing held on 24th October 2002, on the request of the State Government the matter was adjourned to 21st November 2002. Thereafter a reply has been filed stating that though the objections of the Government of Gujarat have been considered by AAIFR on 27th May 2002 the "State Government seeks clarification of the order dated 27th May 2002 in the light of the facts stated in the earlier two letters" i.e. letters dated 25th June 2002 and 16th August 2002. AAIFR has considered this aspect and held that such review is not permissible in law. In any case, the contentions raised in the present petition were not raised before AAIFR and therefore this Court cannot entertain such contentions for the first time in this petition.

10.1 As regards the contention that there was no consent, it is required to be noted that in the communication dated 29th April 2004, the only suggestion on the part of the petitioner was for increase in the promoters' contribution or to rework the scheme in question. This would imply that once the said condition is complied with, the petitioner has no other objection. This letter implies that their consent is subject to increase in the promoters' contribution. Therefore, once the promoters' contribution has been increased by 90%, there cannot be any objection on the part of the petitioner.

10.2 It is borne out from the record that the objections which were required to be filed within stipulated period were not filed and conditional consent was given on the basis of sacrifices of financial institutions and State Government on parity basis and/or higher contribution by the promoter. The authority has considered both the objections and has come to a conclusion in its order dated 27.5.2002 which is final for acceptance of the scheme. The subsequent hearing was fixed to approve the implementation of direction issued in the operative order. The subsequent letters dated 25.6.2002 and 16.8.2992 are nothing but an after thought. The objection with regard to higher sacrifices ought to have been pointed out before 21.4.2002. Therefore, I do not find any merits in the contention raised on behalf of the petitioner in this regard.

10.3 Further, the letter dated 29th April 2002 written by the petitioner does not state or not even suggesting that the consent was withheld. The only objection raised on behalf of the petitioner was considered by the AAIFR, which was not challenged in this petition. Moreover, in the hearing dated 27th May 2002 before AAIFR no further objections were raised on behalf of the petitioner. Even in the order there is no mention about any further objections. I am, therefore, of the view that the petitioner has failed to point out anything from the record that they have withheld the consent at any point of time. On the particular facts of the case the ratio laid down in the case of P. John Chandy and Company (P) ltd. (supra) cited on behalf of the petitioner is not applicable to the facts of the present case.

10.4 Further, the letter dated 4th May 2002 along with the letter dated 29th April 2002 was received by AAIFR beyond the prescribed period of 60 days as mentioned in section 19 of the Act. In that view also, there is a case for deemed consent on the part of the petitioner.

10.5 In the present case it can be presumed that there is deemed consent on the part of the petitioner. Section 19(2) of the Act contemplates deemed consent, which reads as under:

> "(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period,

> not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given."

In any case, since no consent was received before the stipulated time period, it is to be treated as deemed consent.

10.6 The contention raised by the State Government regarding non consideration of their certain claims regarding interest on the past dues, etc. could have been worked out by filing appropriate application before AAIFR at the relevant time or latest by 27.5.2002. It was always open for the petitioner to point out their claim by calculating their total stake. This was not done before the Appellate Authority and such contention has been raised for the first time in this petition or in the subsequent letters dated 25.6.2002 and 16.8.2002. This Court cannot, therefore, go into such questions since the claim or objections were not lodged within sixty days.

10.7 Another contention was raised that the AAIFR cannot go beyond the Government Resolution for according their consent for sanction of the scheme and the AAIFR is bound by the Government Resolution. I am of the view that the Government Resolutions are merely guidelines for taking a decision in appropriate proceedings. Though the said Resolution may be applicable to State Government in various proceedings, such guidelines or the restrictions cannot apply as a matter of rule to the authority under Special Acts

inasmuch as the Government Resolution cannot override the powers of AAIFR which has to consider the scheme keeping in mind the interest of capital investment, the requirement of the industries, interest of workers and other dues of the State Government. AAIFR has to strike a balance amongst all the factors. The Expert Authority constituted under the Act has considered the scheme in detail and therefore, it cannot be said that the scheme has been sanctioned without application of mind. Even otherwise, the Government Resolution itself states that “where relaxation is required in individual cases, Government orders will be obtained”. Therefore, there cannot be any hard and fast rule that in each and every case the Government Resolution should be made applicable in strict sense. Therefore, I do not see any merits in the contention raised by the petitioner that AAIFR is bound by the Government Resolution. The said Government Resolution is only guidelines for government and it will not restrict the power of AAIFR.

10.8 It is also required to be noted that upon the sanction of rehabilitation scheme the same has already been acted upon. The parties have altered their position in accordance with the said scheme. The financial institutions and banks have taken steps to implement the rehabilitation scheme and the promoters have brought additional contribution. Industries are essential part of development of a State. Industries provide ample opportunities for employment and economic growth of the State. The policy of the State itself is

to encourage entrepreneurs to set up industries and subsidy and certain other benefits are extended to such industries. Therefore, when a sick industry is thriving to revive, the State is required to extend all possible assistance in that direction. In the instant case all other parties have actively participated and agreed for the revival scheme. It is also required to be noted that major sacrifice on the part of the petitioner is waiver of past interest and deferment of payment. There is no investment on the part of the petitioner in GSCL. Therefore, looking to the facts and circumstances of the case I am of the view that the petitioner has not made out any case for interference in the impugned order.

11.0 It is worth noting that in the case of Binny Ltd. Vs. AAIFR, reported in [2004] 54 SCL 161 (MAD), it is held that winding up of a sick industrial company should be the last resort under the Sick Industrial Companies Act, 1985, as it would have serious repercussions both economically and socially.

11.1 On the overall facts and circumstances of the case, I find that nothing has been pointed out to show that there is manifest error on the face of record or that there would be grave injustice or gross failure of justice if the impugned order is allowed to stand. I am, therefore, of the opinion that the order of AAIFR is just and proper and no interference is called for.

12.0 In the premises aforesaid, this petition is rejected. Rule is discharged with no order as to costs.

[K.S. JHAVERI, J.]

ar